A **CHENG SENG HUP & ORS**

v.

WANGSA TEGAP SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[CIVIL SUIT NO: S-22NCVC-59-2011]
18 JANUARY 2012

C ***CONTRACT:*** *Frustration - Sale and purchase agreement - Cancellation of project - Poor sales rendered cancellation of project by defendant - Whether supervening and unforeseen events established - Whether change in circumstances beyond control of defendant - Whether unjust on all parties to proceed with sale and purchase agreement*

D ***CONTRACT:*** *Frustration - Sale and purchase agreement - Contract frustrated due to cancellation of project - Remedies available to purchasers - Refund of deposit money - Whether purchasers entitled to claim for LAD*

E By a sale and purchase agreement ('SPA') the 1st and 2nd plaintiffs agreed to purchase a service suite ('the property') from the defendant, the developer of the project known as Berjaya Central Park Suites ('the project'). The 1st and 2nd plaintiffs paid the deposit sum of 10%. However, despite an aggressive campaign
F to promote the project, the sales were poor thus making it practically impossible for the defendant to proceed with the project. The defendant had therefore decided to cancel the project. Pursuant to the cancellation, the developer entered into negotiation with the 49 purchasers of the project, including the
G 1st and 2nd plaintiffs, to rescind the respective SPAs. The 1st and 2nd plaintiffs requested for the refund of 10% of the purchase price together with compensation sum of RM150,000 and incidental costs of RM10,792.32, in view of the appreciation in value of the property in the locality. The defendant was not
H agreeable to the proposal and informed the 1st and 2nd plaintiffs that the SPA had been rescinded due to the supervening and unforeseen event and refunded the 10% deposit to the 1st and 2nd plaintiffs which was accepted by them. Subsequently, the 1st and 2nd plaintiffs' solicitors informed the defendant that the sum
I was being held by them as stakeholders and that the 1st and 2nd plaintiffs were terminating the SPA and sought damages in the sum of RM463,000. The defendant disagreed to the sum being held by the 1st and 2nd plaintiffs' solicitors as stakeholders and

stated that the sum was paid as full and final settlement and the 1st and 2nd plaintiffs had accepted the sum without any reservation. Hence, this suit by the 1st and the 2nd plaintiffs. The issues for the court's determination were, *inter alia*, (i) whether there was breach of the SPA by the defendant; (ii) whether the defendant was entitled to terminate the SPA due to the supervening and unforeseen circumstances which caused the contract to be frustrated; (iii) whether the receipt of the 10% deposit by the 1st and 2nd plaintiffs without reservation amounted to a full and final settlement and whether the 1st and 2nd plaintiffs incurred losses as a result of the alleged termination of the SPA.

Held (dismissing the plaintiffs' claim with costs):

(1) There had been a radical change from the original circumstances when the original obligation was undertaken. The change in the circumstances was never due to the fact that the obligations of the defendant became more onerous to perform. However, the change in the circumstances was beyond the control of the defendant and it made it commercially impossible to perform and it would be unjust on all parties if the SPAs were allowed to proceed on the original concept of development. Thus, the contention by the 1st and 2nd plaintiffs that the defendant had breached the contract which rendered the defence of frustration pursuant to s. 57(2) of the Contracts Act 1950 unsustainable was therefore untenable. (paras 62-64)

(2) The fact that the defendant was only able to sell 2.95% units out of the whole units which were promoted was not challenged. The defendant through its witnesses' evidence had established that there were poor sales and the 1st and 2nd plaintiffs had been notified of the same. Thus, it was without doubt that the SPA of the 1st and 2nd plaintiffs was a frustrated contract and the remedy is provided in s. 15(2) of the Civil Law Act 1956. (paras 67-68)

(3) The defendant had refunded the deposit sum paid by the 1st and 2nd plaintiffs which was accepted by the 1st and 2nd plaintiffs without reservation. There was no further remedy available to the 1st and 2nd plaintiffs. Even assuming that the contract was not frustrated and that the defendant was in breach, the 1st and 2nd plaintiffs had failed to prove any losses which they have allegedly suffered. (paras 69-70)

(4) The 1st and 2nd plaintiffs claimed for LAD although it was not pleaded. The failure to plead special damages in the pleadings was fatal. In any event, the SPA had been terminated by the defendant and LAD was relevant when SPA was subsisting. The 1st and 2nd plaintiffs had also failed to substantiate the claim for general damages as well as the exemplary damages. (paras 71 & 78)

Case(s) referred to:

Goh Yew Chew & Anor v. Soh Kian Tee [1969] 1 LNS 47 FC ***(refd)***

Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd [2007] 3 CLJ 695 CA ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Praed v. Graham [1890] 24 QBD 53 ***(refd)***

Prehn And Another v. The Royal Bank Of Liverpool [1869-71] 5-6 LR Exch 92 ***(refd)***

Rookes v. Barnard And Others [1964] AC 1129 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 15(2)

Contracts Act 1950, s. 57(2)

For the 1st & 2nd plaintiffs - Kunasegaran (Norfadilah with him); M/s Lau, Wong & Partners

For the defendant - B Thangaraj; M/s Thangaraj & Assocs

Reported by Emm Zehra

JUDGMENT

Zabariah Mohd Yusof J:

Background

[1] The 1st and the 2nd plaintiffs are husband and wife and are Singapore citizens.

[2] The 3rd plaintiff is a nominal plaintiff who does not have any claim against the defendant.

[3] The defendant is a developer of a project known as Berjaya Central Park Suites (hereinafter referred to as "the project").

[4] The project involves development of two towers with 39 floors and 1658 Suites on the land situated in Kuala Lumpur. A

[5] By a sale and purchase agreement dated 13 September 2005 (hereinafter referred to as "the SPA"), the 1st plaintiff and the 2nd plaintiff have agreed to purchase a service suite known as parcel No 2, Level No 19, Type B3, Service Suite Tower 28, Berjaya Central Park (hereinafter referred to as "the property") measuring 463 square feet at the purchase price of RM446,500 (hereinafter referred to as "the purchase price") B

[6] Upon execution of the SPA, the 1st plaintiff and the 2nd plaintiff paid the deposit sum of 10 % of the purchase price which is RM44,650 (hereinafter referred to as "the deposit"). C

[7] The 1st plaintiff and the 2nd plaintiff had secured a loan from the 3rd plaintiff to finance the balance purchase price of the property. The facility agreement dated 11 May 2006 is in bundle B at p. 44 to 48. The 1st and the 2nd plaintiff have also signed the deed of assignment dated 11 May 2006 to surrender their rights under the SPA to the 3rd plaintiff. D

[8] The defendant contends that the project was launched on 23 November 2004. Despite the aggressive campaign undertaken by the defendant to promote the project locally and overseas, the response from buyers was far from encouraging. E

[9] It was contended by the defendant that only 2.95 % or 49 units of the service suites were sold after 2 1/2 years of launching. In the light of these circumstances, the defendant was of the view that it would be practically impossible for the defendant to proceed with the project. F

[10] After 2 1/2 years the defendant decided to cancel the project. G

[11] The defendant started to negotiate with the 49 purchasers to rescind the respective SPAs. H

[12] As far as the 1st and the 2nd plaintiff are concerned, there was also negotiation by the defendant with them. The 1st and the 2nd plaintiffs were specifically informed that due to the circumstances it was impossible for the defendant to proceed with the project. I

[13] The 1st and the 2nd plaintiff did not revert to the defendant despite the letters written to the 1st and the 2nd plaintiffs. Hence *vide* letter dated 18 November 2008, the defendant gave a final notice to the 1st and the 2nd plaintiffs to accept the rescission of the SPA and the refund of the deposit plus an *ex gratia* additional sum of 100% of the amount paid, failing which the defendant would refund the sum of RM44,650 as the SPA has become impossible to perform.

[14] By a letter dated 26 November 2008, the 1st and the 2nd plaintiffs' solicitor had informed the defendant that their client's real estate agent had allegedly informed them that the current prices of the condominiums/ service suites around the locality had appreciated and requested the defendant to pay RM194,650 being a refund of 10% of the purchase price and compensation sum of RM150,000 apart from incidental costs of RM10,792.32.

[15] The defendant was not agreeable to the proposal made by the 1st and the 2nd plaintiffs and had accordingly informed the 1st and the 2nd plaintiff's solicitor by letter dated 1 December 2008 that the SPA had been rescinded due to supervening and unforeseen events and informed the solicitor that the actual 10% deposit (RM44,650) which was paid by the 1st and the 2nd plaintiffs would be refunded directly to the 1st and the 2nd plaintiff.

[16] By a letter dated 1 December 2008, from the defendant to the 1st and the 2nd plaintiff, the defendant had forwarded Demand Draft No SCB 947104 for the sum of SCD 18,577.08 (equivalent to RM44,650).

[17] By email dated 22 December 2008 from the 1st plaintiff to DW2, the 1st plaintiff had requested the defendant to reissue the Demand Draft for SGD 18,577.08 as the Demand Draft No SCB 947104 was misplaced by them.

[18] Accordingly a new Cashiers Order No. SCB 947776 for the sum of SGD 18,577.08 (equivalent to RM44,650) was prepared by the defendant under the name of the 1st plaintiff and the 2nd plaintiff and sent to their solicitor by letter dated 12 January 2009.

[19] The 1st and the 2nd plaintiff accepted the payment of the sum of RM44,650 and the Cashiers Order No SCB 947776 was duly presented for payment.

[20] The 1st and the 2nd plaintiffs' solicitor had by a letter dated 19 March 2009, have informed the defendant the sum of RM44,650 is being held by the 1st and the 2nd plaintiffs solicitor as stakeholders. The 1st plaintiff and the 2nd plaintiff are now terminating the SPA and seeking damages for the sum of RM463,000.

[21] The defendant's solicitor, by a letter dated 24 April 2009 informed the 1st and the 2nd plaintiff's solicitor that:

(i) The SPA had already been terminated by the defendant due to supervening and unforeseen circumstances;

(ii) In respect of the 1st plaintiff and the 2nd plaintiff's claim for damages, the defendant had requested for a copy of the report prepared by the 1st and the 2ndf plaintiffs' real estate agent;

(iii) The defendant did not agree that the sum of RM44,650 is to be held by the 1st and the 2nd plaintiffs' solicitor as stakeholder as the sum of RM44,650 was paid by the defendant as full and final settlement and the 1st plaintiff and the 2nd plaintiff had accepted the sum without any reservation.

[22] There was no reply by the 1st and the 2nd plaintiffs' solicitor to the defendant's solicitor letter dated 24 April 2009.

[23] Hence the present suit was filed by the 1st and the 2nd plaintiffs in January 2011 seeking for the following reliefs:

(i) A declaration that the defendant had breached the SPA dated 13 September 2005;

(ii) A declaration that the SPA dated 13 September 2005 had been terminated due to the breach by the defendant;

(iii) That the defendant is to refund to the 1st and the 2nd plaintiffs the purchase price which was paid by the 1st and the 2nd plaintiffs to the defendant in the amount of RM44,650;

(iv) That the defendant is to pay the legal fees amounting to RM10,792.32;

(v) That the defendant pay general damages in the amount of RM463,000 or as assessed by the SAR;

(vi) That the defendant to pay exemplary damages;

(vii) Interest on the judgment sum;

(viii) Costs.

The Allegations By The 1st And The 2nd Plaintiffs In The Statement Of Claim

[24] Paragraph 23 of the statement of claim alleged that the defendant had breached the agreement when the defendant had unilaterally terminated the agreement as there is no provision in the agreement for the defendant to rescind the agreement.

[25] As a result of the breach the 1st and the 2nd plaintiffs have incurred loss and damages as the land which is located in the vicinity had increased in value ie, twice the original value.

[26] The case went for full trial. The plaintiffs called one witness, PW 1 who is the 1st plaintiff.

[27] The defendant called two witnesses ie:

(i) DW1: a registered valuer and estate agent;

(ii) DW2: the General Manager of the defendant company.

[28] Issues To Be Tried

(i) Whether there is breach by the defendant of the SPA dated 13 September 2005;

(ii) Whether the defendant is entitled to terminate the SPA dated 13 September 2005 due to the supervening and unforeseen circumstances which caused the contract to be frustrated;

(iii) Whether the receipt of the Cashier Order No 947776 by the 1st and the 2nd plaintiffs without reservation amounts to a full and final settlement of any claim by the 1st and the 2nd plaintiffs against the defendant;

(iv) Whether the 1st and the 2nd plaintiffs incurred losses as a result of the alleged termination of the SPA dated 13 September 2005

The Court's Findings

[29] In the course of the trial, the 1st and the 2nd plaintiffs raised the following as part of their defence:

(i) the notice of termination dated 18 November 2008 was allegedly issued only when the project was due for completion. Therefore the plaintiffs alleged that there is *mala fide* on the part of the defendant when it rescinded the agreement;

(ii) The defendant did not commence any work at all at the site;

(iii) There was no market viability exercise done by the defendant before launching the project and the failure of the project was due to the failure of the defendant to carry out the same before venturing into the project.

[30] The defendant submits that these issues are not pleaded, hence it should not be considered by this court.

[31] I agree with the submission by the defendant on this point. It is trite law that parties are bound by its own pleadings and any diversion should be prohibited. Therefore the plaintiffs are not allowed to ventilate on the same.

[32] The central issue that arises from the pleadings in this case is whether the defendant is entitled to rescind the agreement due to the events that have occurred which according to the defendant has made it impossible for the defendant to carry on with the project.

[33] The defendant submits that the agreement had been frustrated due to some supervening event. This point will determine the 1st and the 2nd issue raised in the case herein.

[34] The doctrine of frustration is provided in s. 57 of the Contracts Act 1950.

which states:

(1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful;

A (3) Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promise for any loss which the promise sustains through the non-performance of the promise.

B

[35] The Court of Appeal in the case of *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695 sets out the three elements that must be fulfilled before the doctrine of frustration can be applied when it stated as follows:

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> It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s. 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which **no provision has been** made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, **the event relied upon by the promisor must be one for which he or she is not responsible**. Put shortly, self induced frustration is ineffective. Third, **the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract**. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then section 57 does not bite. (emphasis added)

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E

F **[36]** The ingredients to be satisfied before this doctrine can be applied in any contract are:

(i) No provision has been made in the contract;

G (ii) Events relied upon by the promisor must be one to which he is not responsible;

(iii) It would be unjust to enforce the original promise.

The Supervening Event

H **[37]** The supervening event according to the defendant is the fact that despite the aggressive marketing that was taken by the defendant, the sales was poor. After all the hard work of aggressive campaigning both locally and internationally, there were only 49 buyers for the whole project. This was evident from the testimony of DW2, the General Manager in Properties marketing Division of the defendant, who said in Answer to Question 10 of her witness statement in exh. D3.

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[38] DW2 in evidence said that:

> The defendant negotiated with all the 49 purchasers to rescind the sale and purchase agreement by explaining to them of the poor sales and the Project based on its original concept of development would fail. This would be evident from the poor response from prospective purchasers despite the aggressive marketing. The defendant offered to refund the 10% deposits which were paid. In addition and on a strictly without prejudice basis, the Defendant paid an ex-gratia compensation sum of up to 87 % of the 10% deposit paid. 48 purchasers understood the reasons for the defendant to rescind the sale and agreed to rescind the sale after being informed that it would not be possible to proceed with the Berjaya Central Park project. The 48 purchasers understood that it was also in their best interest to accept the rescission of the sale and purchase agreement.

[39] It was also in evidence that the defendant had waited for 2 1/2 years before deciding to negotiate with the 49 buyers to rescind the respective SPAs.

[40] The fact of the poor sales was intimated to the 1st and the 2nd plaintiff as early as 2007. This is evident from the letters dated 6 September 2007, 20 November 2007, 14 January 2008, 6 February 2008 and 20 February 2008 which were written to the 1st and the 2nd plaintiffs to rescind the contract and to refund the deposit which both the plaintiffs have paid. In the letter dated 18 November 2008 (p. 62 Bundle B) the defendant had written to the 1st and the 2nd plaintiff after a meeting which was held on 20 February 2008. Paragraph 2 of the said letter states as follows:

> Having repeatedly mentioned in our numerous correspondence with you in respect of the abovementioned property, we wish to reiterate that our proposal to a rescission of the Sale and Purchase Agreement (SPA) entered into between us is due to our company's decision to change entirely the concept and layout of the abovesaid project to meet the demands and trends currently in the Kuala Lumpur property market. The reason for us to make this decision was due to poor sales response as the demand for the current concept is not favourable to the purchasers/investors in entirety. Due to the poor sales status we would definitely not be able to proceed with the project in its original concept and layout. We are currently advised to reposition the current development, and in view of material and radical change to the project, we will no longer be in a position to deliver the properties that you had purchased.

[41] Paragraph 3 of the same letter made references to several other letters which were written by the defendant to the 1st and the 2nd plaintiffs which had informed both the plaintiffs of the impossibility to perform the SPAs. Therefore the fact of the poor sales and the impossibility to perform the SPAs by the defendant is not something new to the 1st and the 2nd plaintiffs. This fact was made known to them by the defendant as early as 2007. When the 1st and the 2nd plaintiffs were informed of the same, there was no request from both of the plaintiffs for any document. In fact the letter from the 1st and the 2nd plaintiffs' solicitors dated 26 November 2008 (p. 63 Bundle B) states that "the unforeseen circumstances is not acceptable and not provided by the agreement." It was not expressly disputed by the 1st and the 2nd plaintiff as to the poor sales and response from buyers or that the defendant needed to reposition itself as far as the project is concerned.

[42] DW2 who was personally involved in the marketing of the project testified as to the negotiations with the 49 purchasers. PW1 admitted that DW2 met PW1 to negotiate on the rescission of the SPA. Therefore I have no reason to doubt the evidence of DW2 on the poor sales and the negotiations which was held with the 49 purchasers.

[43] In addition, the fact of poor sales was also established via a Rational Study Report which was prepared by the firm of Knight Frank which is exhibited in D2. In gist the report states that if the project were to proceed on the original concept, the development of the project is doomed to fail due to poor sales and response from buyers. This is evident from para 3.2.1 and 3.3 of D2. The report examined the various weaknesses of the original concept of development. To obtain good sales the defendant was advised to reposition itself on the concept of the development.

[44] The contents of D2 was never challenged by the 1st and 2nd plaintiffs. PW1 only raised the issue that he did not have personal knowledge that only 49 units of the service suites were sold. This aspect of the evidence from DW1 would support the fact that there was poor sales, the defendant could not proceed on the original concept and that the defendant needed to reposition itself on the concept of development to attract sales for the project.

[45] Therefore as far as the evidence of the poor sales and the effort taken by the defendant to promote the same has been established by the defendant.

1st Element: Whether There Is Provision In The Contract Between The 1st And The 2nd Plaintiffs With The Defendant

[46] When the fact of the impossibility to perform by the defendant was conveyed to the 1st and the 2nd plaintiffs as early as 2007, the reply by the 1st and the 2nd plaintiffs' solicitors dated 26 November 2008 (p. 63 Bundle B) never made any request for clarification nor document save for an express statement that "the unforeseen circumstances is not acceptable and not provided by the agreement."

[47] Hence, this is an express admission on the part of the 1st and the 2nd plaintiffs that there was indeed no issue as to the fact that the SPA between the 1st and the 2nd plaintiffs and the defendant does not contain any provision on the supervening event/circumstances.

2nd Element: Whether The Event Relied Upon By The Defendant Is One Which The Defendant Is Not Responsible

[48] DW2 in her evidence said that there had been aggressive campaigns by the defendant in the marketing of the project for 2 1/2 years both locally and internationally. Despite such efforts, only 49 units were sold which is about 2% of the total units.

[49] The report by Knight Frank in exh. D2 shows that with the original concept of the project, it has not received the required response from buyers and it will remain to be so, unless the defendant changed the concept so as to attract buyers. The report stated that the weaknesses of the original concept had been examined and it was strongly recommended that it be changed.

[50] Therefore it cannot be said that the reason for the poor sales were due to the defendant.

[51] I am minded of the fact that a contract which is difficult to perform does not mean that the contract is frustrated. This has been stated by the Federal Court in the case of *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430 at p. 439 at para. 22:

A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interprete. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into (see *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corp Ltd* [1942] AC 154 (HL). A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed (see *Visu Sinnadurai, Law Of Contract In Malaysia And Singapore: Cases and Commentary* (2nd Ed, 1987) at p 519).

[52] Applying the principle as enunciated by the Federal Court in the case cited above, to the facts in our present case, the fact that there were poor sales to the project does not fall in the category of contract which is "difficult to perform." I would think that it is commercially impossible if not practical to proceed with the project when there is no buyer to the project despite the aggressive marketing both locally and internationally. I find support also in the Federal Court case of *Goh Yew Chew & Anor v. Soh Kian Tee* [1969] 1 LNS 47; [1969] 1 MLJ 138 at p. 141 which adopted *Chitty on Contracts* (22nd edn) which stated as follows:

The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfill the contract. The doctrine is not concerned with initial impossibility which renders a contract *void ab initio*, as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.

[53] Therefore the circumstances is not something which is foreseeable by the defendant when it launched the project. At the time when the project was launched the defendant never knew that with the original concept the sales response would be very bad.

It Would Be Unjust To Enforce The Original Promise

[54] It was in evidence that the defendant managed only to make sales of 2.95% ie, only 49 units out of the 1658 units were sold.

[55] From the report of Knight Frank in exh. D2, it would not be viable for the project to proceed until 70-90% sales are met. Since the project only had 2.95% it certainly is not advisable to go on with the same.

[56] If the project is allowed to go on, it would not be fair to the defendant as commercially it is heading towards disaster. As far as the purchasers are concerned, surely they would not want to purchase a property where there are hardly any purchasers. It would not be conducive to stay in a building where there is hardly any residents. In addition, this would have effect on the value of the property for investment purposes. This was said by DW1 in his evidence that:

> looking at the purchasers' point of view, it would not be a good move. The Project's slow sales in itself shows that demand for such units are limited and as an investment it would not have been a good investment for anyone of the purchasers.

[57] It does not make good business sense for one to buy such property knowing that it would not make a good investment of the property. The 1st and the 2nd plaintiffs said that they bought the property for their own use and not for investment purposes.

[58] However, it has been shown that the 1st and the 2nd plaintiffs bought the units for investment purposes. This can be discerned from the document at p. 54 of bundle B where it was stated that the 1st and the 2nd plaintiffs bought the property for "investment", despite PW1 denying filing in the column that stated the purpose of buying the units was for "investment" purposes.

[59] It was also in evidence that the 1st and the 2nd plaintiffs do not have any business in Malaysia and neither are they residing in Malaysia. The 1st and the 2nd plaintiffs are residing in Singapore and the 1st plaintiff is working in China. Hence it cannot be disputed that the purchase of the units was for investment purposes.

[60] In cross-examination when PW1 was asked as to whether it was worthwhile to purchase the units for investment, PW1 answered "I have no comment if I am buying it for investment purposes."

[61] It is clear that PW1 is evading to answer a clear direct question when he is fully aware that to buy a property which does not attract good sales is certainly a bad investment.

[62] Therefore, it would be totally unjust to the defendant and also to the purchasers (ie, the 1st and the 2nd plaintiffs) if the original SPA is to be enforced when it is commercially impossible for the defendant to perform. There has been a radical change from the original circumstances when the original obligation was undertaken, which are:

(i) The original concept was not viable based on reports in D2;

(ii) After aggressive marketing for 2 1/2 years locally and internationally, the sales received were poor.

[63] The change in the circumstances was never due to the fact that the obligations of the defendant became more onerous to perform. However the change in the circumstances was beyond the control of the defendant and it makes it commercially impossible to perform and it would be unjust on all parties if the SPAs are allowed to proceed on the original concept of development.

[64] Hence the contention by the 1st and the 2nd plaintiffs that the defendant had breached the contract which renders the defence of frustration pursuant to s. 57(2) of the Contracts Act 1950 unsustainable, is therefore untenable.

Failure Of The Defendant To Produce All The 49 SPAs

[65] It is the contention of the plaintiffs' counsel that the defendant failed to show to the court all the 49 SPAs.

[66] On this issue first of all, there has not been any request by the 1st and the 2nd plaintiffs with regard to the 49 SPAs. There was no notice of produce served on the defendant or its solicitors.

[67] In any event there is no challenge that the defendant was only able to sell 2.95% (49) units out of the whole units which were promoted. DW1 and DW2 through their evidences have established that there were poor sales and the 1st and the 2nd plaintiffs had been notified of the same *vide* letter dated 18 November 2008. There was never any request from the plaintiffs for the production of the 49 SPAs then.

[68] Therefore from the above, it is without doubt that the SPA of the 1st and the 2nd plaintiffs and the defendant is a frustrated contract and the remedy is provided in s. 15(2) of the Civil Law Act 1956.

Remedy

[69] The defendant had refunded the deposit sum paid by the 1st and 2nd plaintiffs. The payment of refund by the defendant were accepted by the 1st and 2nd plaintiffs without reservation. There is no further remedy available to the 1st and 2nd plaintiffs.

[70] Even assuming for a moment that the contract is not frustrated, (which in this case I have determined that it is so), and that the defendant is in breach, the 1st and 2nd plaintiffs have failed to prove any losses which they have allegedly suffered. The 1st and the 2nd plaintiffs are claiming for:

(i) Whatever purchase price paid by the 1st and the 2nd plaintiffs to the defendant to the amount of RM44,650;

(ii) The legal fees to the amount of RM10,792.32;

(iii) General damages to the amount of RM463,000

[71] It is to be noted that the 1st and the 2nd plaintiffs are claiming for LAD although it is not pleaded. This can be seen from the answer to question 5 in PW1's witness statement. However, special damages have not been pleaded by the plaintiffs in the pleadings. Failure to do so is fatal. In any event the SPA had been terminated by the defendant *via* letter dated 19 March 2009. LAD is relevant when the SPA is subsisting. Upon termination the plaintiffs are only entitled to claim for damages and not LAD.

[72] As for the claim of general damages of RM463,000 the plaintiffs have failed to substantiate such a claim.

[73] The evidence of the 1st and 2nd plaintiffs is that in a letter dated 26 November 2008 (p. 63 Bundle B) the 1st and 2nd plaintiffs' solicitor had alleged that the 1st and 2nd plaintiffs were informed by real estate agents that the property prices in the locality is high. In a subsequent letter dated 19 March 2009 (p. 68 Bundle B) the 1st and 2nd plaintiffs are claiming the amount of RM463,000 from the defendant.

[74] The defendant had requested for support or basis for the claim by the 1st and the 2nd plaintiffs *vide* letter dated 24 April 2009 (p. 1-2 bundle C), however there was no valuation report or basis provided by the 1st and the 2nd plaintiffs. In fact the basis of the claim was told by PW1 as follows:

I have not prepared any valuation report to support my claim of RM463,000.00 because I am basing on my buying price. Since they want to take back my unit so no seller will want to sell it below their buying price. I do not have a valuation report prepared because I am basing on my purchase price.

[75] In the absence of any other valuation report on the part of the 1st and the 2nd plaintiffs, clearly the statement made by PW 1 cannot be a basis for the claim. In sharp contrast is the report by the defendant in exh. D2 and the evidence of DW1 which essentially points to the fact that the project cannot attract buyers and it would be a disaster to proceed further. This evidence has not been rebutted nor challenged by the 1st and the 2nd plaintiffs.

[76] It is possible to calculate general damages but there must be evidence to assist the court in calculating it. Special damages, on the other hand, must be claimed specially and proved strictly. Of course, general damages are such that the law will presume to be the direct, probable or natural consequence of the action complained of but evidence must be led to assist the court in computing the quantum. One cannot throw general damages, or special damages at the feet of the court and expect the court to award the amount. One has to to prove it by leading evidence (*Prehn And Another v. The Royal Bank Of Liverpool* [1869-71] 5-6 LR Exch 92;

[77] As for the claim of legal fees, since the contract was frustrated the claim for legal fees cannot be entertained.

[78] As for the claim for exemplary damages, there is no evidence led by the plaintiffs. The main purpose of exemplary damages is to punish and according to Lord Devlin in *Rookes v. Barnard And Others* [1964] AC 1129 at 1227to 1228, three conditions must be fulfilled:

(a) that a claimant cannot recover exemplary damages unless he or she is the victim of punishable behaviour;

(b) that the awards of exemplary damages should be moderate; and

(c) the financial means of the parties.

[79] The conduct of the parties has to be taken into account and it remains a relevant consideration in assessing exemplary damages (*Praed v. Graham* [1890] 24 QBD 53). There is no evidence led at all on the above three ingredients above. There is nothing to show that the plaintiffs are a victim of some punishable behaviour on the part of the defendant. Why should the defendant be punished for some event (ie, the project doomed to fail as it failed to attract buyers) which is beyond their power or control.

Conclusion

(a) The defendant has established that the SPA was rescinded due to poor sales which is an unforeseen and supervening events. This was not provided for in the contract.

(b) Despite aggressive marketing both national and internationally, there were poor sales, and this is beyond the control of the defendant. The SPA had become physically and commercially impossible to perform due to the change in circumstances.

(c) Therefore the SPA, *prima facie*, was dissolved by frustration.

(d) The SPA was lawfully rescinded by the defendant.

(e) It would be unjust to enforce the original promise.

[81] Therefore based on the above the claim by the plaintiffs is dismissed with costs.